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In the Supreme Court of the United States

APRIL TERM, 1976

No. 75-1406

JOAN ELIOPULOS
Petitioner

V.

V. H. HILDYARD, M. D., AND
MEDICAL ADMINISTRATIONS INC., *Assignee*

PETITION FOR A WRIT OF CERTIORARI TO THE
COURT OF APPEALS OF THE STATE OF COLORADO

JOAN ELIOPULOS
PETITIONER, PRO SE
1161 SOUTH FOOTHILL DRIVE
LAKEWOOD, COLORADO, 80228

APRIL, 1976

INDEX

	Page
Opinions Below	1
Jurisdiction	2
Questions Presented	2
Statement of the Case	2
Reasons to Grant Certiorari	5
Conclusions	6
Appendix A	1a
Appendix B	2a
Appendix C	7a

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V. H. HILDYARD, M. D., AND MEDICAL ADMINISTRATIONS INC., *Assignee*

Petitioner, Joan Eliopulos, prays for a writ of certiorari to review the opinion and judgment of the Court of Appeals of the State of Colorado in this case.

OPINIONS BELOW

The opinion of the Court of Appeals (Appendix B, P. 2a) is reported (D. Colo. 1975).

The opinion and decision of the District Court C27482 Division 1 is on record in the Colorado Court of Appeals.

JURISDICTION

The Court of Appeals of the State of Colorado entered judgment on November 6th, 1975.

A timely petition for rehearing was denied on November 28th, 1975.

Petition for a writ of certiorari to the Colorado Court of Appeals was denied by the Supreme Court of the State of Colorado on February 17, 1976.

The jurisdiction of this Court is invoked under 28 U.S.C. 1257(3).

QUESTIONS PRESENTED

1. Whether Doctor Hildyard's impairment interfered with his ability to perform delicate microsurgery of the ears.

2. Whether V. H. Hildyard, M.D. was negligent in failing to advise the petitioner that he was suffering from a physical disability to the extent that he could not properly and effectively operate upon this petitioner.

3. Whether V. H. Hildyard, M.D. was negligent in failing to advise the petitioner that he was suffering from a physical disability to the extent that he could not properly and effectively operate for a prolonged period of time.

4. Whether it is a patient's inherent right to be informed of the attending physician's disability before any surgery is attempted upon patient's body.

STATEMENT OF THE CASE

This claim arises out of that certain action brought in the County Court and in and for the City and County of Denver and the State of Colorado in the Civil Division entitled Medical Administrations Inc., (plaintiff), -vs- Joan Eliopulos (defendant), and which related to the filing of a counterclaim.

BLEED THROUGH

Since the commencement of the suit in the County Court for damages to petitioner's left ear as a result of surgery performed by V. H. Hildyard, M.D., petitioner only on October 7th, 1972, when a newspaper article appeared in The Rocky Mountain News, did become aware that V. H. Hildyard, M.D. had been injured in an automobile traffic accident on May 21st, 1969, and prior to the surgery upon this petitioner, for which V. H. Hildyard, M.D. was found to deserve a jury award and compensation in the amount of $315,000.00 on October 6th, 1972, in the District Court in and for the City and County of Denver, State of Colorado, Civil Action Case No. C-11660, Division 5 – which injury by V. H. Hildyard's own admission caused permanent disabling injuries to his left arm, hand, and fingers and a loss of skill to properly and effectively perform delicate microsurgery of the ears.[1]

On June 3rd, 1970, in the City and County of Denver, State of Colorado, V. H. Hildyard, M.D., a physician and surgeon specializing in otology, relating to microsurgery of the ears, knowingly, willfully, and with a wanton and reckless disregard for petitioner's rights and feelings, performed a surgical stapedectomy procedure on petitioner's left ear at which time and place V. H. Hildyard, M.D. well knew he had lost the use of his left arm, hand and fingers and the necessary skill to properly and effectively perform as an ear surgeon as a result of injuries he received in an automobile traffic accident on May 21st, 1969.

Petitioner entered surgery on June 3rd, 1970 with all the confidence in the world because she felt she had a surgeon who had the full use of both his hands – who had the skill and dexterity of fingers vital to his capability to properly and effectively perform the necessary procedure required.

Within weeks this petitioner began to feel the results of the June 3rd, 1970 surgery. Her hearing, the beautiful hearing she had before surgery was gone. Petitioner's ear felt like a wad of cotton was muffling all sound. She could not chew

[1] See Appendix A.

without feeling movement of some loose object in her left ear. Petitioner could not bend or stoop without getting dizzy – and the nights were the worst. Petitioner could not sleep for the loud noises she heard in her left ear. When she did sleep, petitioner would be awakened to find there was numbness on the left side of her face. When the numbness wore off there was severe sharp pain that lasted just for seconds, but it was there! This petitioner suffers today as a result of the June 3rd surgery.

At the request of V. H. Hildyard's council, April 14th, 1972, petitioner underwent a complete ear examination by their otologist, Marlin Weaver, M.D. The Doctor's report contained the following:

> Joan Eliopulos is suffering from an ineffective sound conductive mechanism in the middle left ear.

The ineffective sound conductive mechanism is the wire prothesis which V. D. Hildyard, M.D. placed in petitioner's left ear – with an impaired left hand – during surgery on June 3rd, 1970.

Through a Prudential insurance claim, V. H. Hildyard, M.D. did in fact perform one type of surgery but claimed to have done another. The insurance form concerns Dr. Hildyard's claim for six hundred dollars medical services rendered to petitioner for surgery on June 3rd, 1970. V. H. Hildyard, M.D. refers to "shattered footplate removed." He later denied he performed this type of surgery.

V. H. Hildyard's surgical nurse and assistant, Muriel Hanewinckel, under oath, so testified, "Yes sir, I can tell you some things that have happened since his accident that have never happened since I have been working for Dr. Hildyard. He was doing all these crazy things in the operating room that he had never done before and this indicated to me something was haywire somewhere."

In February of 1975, the Honorable Justice Charles Goldburg dismissed petitioner's Civil Action Suit No.

BLEED THROUGH

C-27482 with a directed verdict in favor of V. H. Hildyard, M.D.

V. H. Hildyard, M.D. was given permission through the Colorado District Court and by the Trial Judge to continue his one armed surgery – microsurgery so delicate that in Dr. Hildyard's own words, one slip of the fingers and school's out.

Petitioner then appealed to the Colorado Court of Appeals. It was concluded that the verdict was properly directed as to the four negligence claims but should not have been directed on the claim for breach of warranty. It was reversed as to that claim only and remanded for a new trial on that claim only.

Petitioner's petition for a writ of certiorari from the Supreme Court of the State of Colorado was denied by the Supreme Court of Colorado on February 17, 1976.

Therefore, this petitioner prays for a writ of certiorari from the Supreme Court of the United States, Washington, D.C.

REASONS TO GRANT CERTIORARI

This Honorable Court has just granted certiorari to consider questions one, two, three and four in the interest of better serving justice. All evidence to prove negligence stems from one indisputable fact. V. H. Hildyard, M.D. well knew he had lost the use of his left arm, hand and fingers and the necessary skill to perform any of his microsurgery requiring the use of the operating microscope.

Petitioner contends when the Medical Society of the State of Colorado fails to censure and initiate any precautionary methods to prevent unethical, incompetent and negligent surgeons in the medical profession from consciously performing surgical procedures that are motivated by their greed for money and not within the gamut of accepted medical standards, such as the case at bar, litigation begins and the

courts of law must step IN to protect the rights and feelings of over two hundred million users of medical services in these United States.

Damages are allowed – not only as compensation to the injured – but rather as a deterrent to other imcompetent disabled surgeons who may wish to follow in Dr. Hildyard's footsteps.

Therefore, if there be no ruling on impaired negligent surgeons who attempt surgery on unwary patients without their knowledge or informed consent, then, let there be a ruling set forth by this Honorable Court beginning with this petitioner's case.

CONCLUSION

Petitioner prays this high tribunal and Honorable Justices therein exercise the original jurisdiction of their sound and judicial power – the power of judging wisely, and justly grant this petition for a writ of certiorari. Find for this petitioner, grant her the relief she sought at the beginning of this action and for such other relief as to the Honorable Court seems just and proper.

Respectfully submitted:

JOAN ELIOPULOS,
Petitioner, pro se
1161 South Foothill Drive,
Lakewood, Colorado 80228.

APRIL, 1976

APPENDIX

BLEED THROUGH

APPENDIX A

Doctor awarded $315,000 in suit

A Denver District Court jury awarded a $315,000 judgment Friday to a surgeon whose ability to perform delicate ear operations was impaired by an auto collision three years ago.

The jury deliberated six hours before returning the judgment in favor of Dr. Victor H. Hilliard, 55, of 955 Eudora St. Named as defendants in the civil suit were Harvey Bostrom, 25, of 4671 Grant St., and his employer at the time of the crash, Western Fasteners Inc.

Hilliard said his left hand and left upper shoulder were injured when a pickup driven by Bostrom plowed into the rear end of his car on May 5, 1969, at S. Colorado Boulevard and E. Florida Avenue.

Since the crash, Hilliard said, he has been able to continue as a surgeon but has been prevented from performing two types of very delicate ear operations because of tingling and frequent numbness in his left hand.

Hillard has asked a $395,258 judgment for loss of enjoyment of life, loss of his capacity to perform as an ear surgeon and loss of future earnings.

APPENDIX B

COLORADO COURT OF APPEALS

No. 75-173

JOAN ELIOPULOS, Plaintiff-Appellant,

v.

VICTOR H. HILDYARD, M.D., Defendant-Appellee

and

MEDICAL ADMINISTRATIONS, INC., Assignee,

Defendant.

Appeal from the District Court of the
City and County of Denver

Honorable Charles Goldberg, Judge

DIVISION I

JUDGMENT AFFIRMED IN PART,
REVERSED IN PART, AND
REMANDED WITH DIRECTIONS

Coyte, Van Cise, and Sternberg, JJ.

Joan Eliopulos
Pro Se
Zarlengo, Mott and Zarlengo
John C. Mott
Denver, Colorado
Attorneys for Defendant-Appellee

Opinion by JUDGE VAN CISE

BLEED THROUGH

Plaintiff, Joan Elipuolus (the patient), sought to recover damages for alleged injuries purportedly resulting from an ear operation performed by defendant, Victor H. Hildyard, M.D. (the Doctor). Contending that substantial evidence was presented in support of her claims for negligence and breach of warranty, the patient appeals the judgment entered on the verdict directed for the doctor on all claims at the conclusion of her case. Upon review of the evidence in the light most favorable to the patient, *see Jasko v. F. W. Woolworth Co.*, 177 Colo. 418, 494 P.2d 839, we conclude that the verdict was properly directed as to the four negligence claims but should not have been directed on the claim for breach of warranty. We therefore reverse as to that claim only.

I

During argument on the motion for directed verdict, counsel for the patient conceded that a *prima facie* case had not been established on the claims based on (1) improper diagnosis, and (2) negligent performance of surgery. We agree.

As to the claim that doctor's own physical impairment resulted in negligent performance of surgery due to lack of skill, the patient produced no evidence showing either negligence in the performance of the surgery or any impairment in the doctor's ability to perform, or in his performance of, this particular surgery. Further, there was no evidence to establish any casual connection between the surgery and the patient's condition thereafter. In fact, there was evidence indicating that her hearing actually improved following the operation. Her later regression was not shown to be in any way related to what the doctor had done.

The final negligence claim was premised on the allegations that the doctor was negligent in failing to advise the patient of the serious nature and circumstances, the risks, and the possible complications inherent in the proposed surgery, and in failing to advise her of his own physical impairment, and that, as a proximate result of this negligence, the patient was damaged. There being no proof that her post-operative

condition was caused by the surgery, that claim also was properly rejected. *Lamme v. Ortega*, 129 Colo. 149, 267 P.2d 1115; *Brown v. Hughes*, 94 Colo. 295, 30 P.2d 259.

The patient having failed to prove the elements of negligence, a directed verdict was proper as to those claims. That there may have been a bad result is not of itself proof of negligence on the part of the doctor. *Brown v. Hughes, supra.*

II.

"In the absence of a special contract otherwise providing . . . a physician . . . does not undertake to warrant a cure and is not responsible for want of success, unless that want results from failure to exercise ordinary care, or from his want of ordinary skill." *Brown v. Hughes, supra; Locke v. Van Wyke*, 91 Colo. 14, 11 P.2d 563. However if the facts disclose that a warranty was made, was breached, and that damages resulted therefrom, then the patient does not have an actionable claim thereon against the doctor. *See Bailey v. Harmon*, 74 Colo. 390, 222 P. 393; *Noel v. Proud*, 189 Kan. 6, 367 P.2d 61; *Seanor v. Browne*, 154 Okla. 222, 7 P.2d 627. Such a claim is based on contract, not negligence, and damages, if any, are "restricted to the payments made and to the expenditures for nurses and medicines or other damages that flow from the breach thereof." *Noel v. Proud, supra.*

In the instant case, the patient alleged that the doctor expressly warranted that the operation would be successful, and that it would substantially reduce the partial hearing loss in her left ear. She further alleged that, in reliance on this warranty, she agreed to the operation and, as a result thereof, she now suffers from a much more severe hearing loss and has incurred other complications, which together constitute a breach of the warranty. The doctor denied these allegations.

In support of her claim, the patient and her mother, who accompanied her to the doctor's office on at least one occasion, testified as to statements made by the doctor prior to the operation. The trial court correctly ruled that certain statements claimed to have been made by the doctor, that the

BLEED THROUGH

patient would be "reborn with a brand new ear," or "had not a thing to worry about," did not rise to the dignity of an express warranty. *See Marvin v. Talbott*, 216 Cal. App. 2d 283, 30 Cal. Rptr. 893, in which the court held that the assertion, "I will make a new man out of you," was "so vaguely expressed as to be wholly unascertainable" and therefore did not constitute a warranty.

There is other testimony in the record, however, which is more specific. The patient related that Dr. Hildyard had told her that after the operation her hearing would be "better than normal." Her mother testified that the doctor had assured the patient "she would hear better than before, words that she never had heard." These phrases have ascertainable meanings.

The doctor denied making any of these statements. Therefore, an issue of fact existed for determination by the jury. "[W]here there is substantial evidence tending to establish a cause of action, it is error to direct a verdict in favor of defendant; . . . it is not for the court to judge as to the weight of the evidence nor the credibility of witnesses." *Nelson v. Centennial Casualty Co.*, 130 Colo. 66, 273 P.2d 121.

The judgment is reversed on the breach of warranty claim, and the cause is remanded for a new trial on that claim only.

JUDGE COYTE and JUDGE STERNBERG concur.

IN THE SUPREME COURT OF THE
STATE OF COLORADO

75-173 No. C-855 January Term, 1976

JOAN ELIOPULOS,

Petitioner,

vs.

V. H. HILDYARD, M.D., and
MEDICAL ADMINISTRATIONS, INC.,
ASSIGNEE,

Respondents

ON PETITION FOR WRIT OF CERTIORARI to the Court of Appeals.

After review of the record, the briefs and the opinion of the Court of Appeals,

IT IS ORDERED by this court that said petition be, and the same hereby is, denied.

February 17, 1976

By the Supreme Court
Sitting En Banc

BLEED THROUGH

APPENDIX C

LODGED WITH THIS PETITION FOR A WRIT OF CERTIORARI ARE THE FOLLOWING:

MISCELLANEOUS EVIDENCE:

1. Deposition of Dr. Hildyard C-11660, 3/11/70, three months prior to surgery upon this petitioner June 3rd, 1970.

2. Civil Action C-11660 excerpt of testimony V. H. Hildyard VS. Western Fasteners Inc., A Colorado Corp., and Harvey Bostrom. This excerpt of testimony is evidence by V. H. Hildyard's own admission of his impairment and disability. Evidence of how it affected his surgical procedures.

3. Civil Action C-11660 excerpt of testimony Muriel Hanewinckel. This is testimony by V. H. Hildyard's nurse and assistant concerning Dr. Hildyard's impairment and how it affected his surgical procedures.

4. Leston B. Nay, M.D., Dr. Hildyard's attending physician's report concerning V. H. Hildyard's injuries and how it affected his surgical procedures.

5. Dr. Marlin Weaver's medical report concerning petitioner.

6. A Prudential insurance claim form concerning petitioner's surgery on June 3rd, 1970.

7. Interrogatories sent to V. H. Hildyard. This concerns Dr. Hildyard's claim for medical services rendered to Miss Eliopulos during the operation on June 3rd, 1970. He refers to "SHATTERED FOOTPLATE REMOVED". He later denied he performed the above.

8. A letter of apology V. H. Hildyard mailed to Miss Eliopulos dated in December of 1972 concerning her surgery on June 3rd, 1970 and his disability.

9. Certificate of Mailing.